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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re JORDAN D., a Person Coming Under  
the Juvenile Court Law.

CONTRA COSTA COUNTY CHILDREN  
& FAMILY SERVICES BUREAU,

Plaintiff and Respondent,

v.

N.D.,

Defendant and Appellant.

A139927

(Contra Costa County  
Super. Ct. No. J12-00906)

N.D. (mother) appeals a juvenile court order terminating her parental rights and placing her daughter for adoption. (Welf. & Inst. Code, § 366.26.)<sup>1</sup> Mother contends she was denied effective assistance of counsel because counsel did not seek writ review of an antecedent order terminating family reunification services and did not petition for reinstatement of reunification services in advance of the permanency planning hearing at which parental rights were terminated. We shall affirm the order.

**Statement of Facts**

Mother has four children and an extensive history with child protective services and the criminal justice system arising from drug addiction. Mother began using drugs as a teenager and is now 32 years old.

<sup>1</sup> All further section references are to the Welfare and Institutions Code.

Mother's first contact with the Contra Costa County Children and Family Services Bureau (bureau) was in August 2006 when she gave birth to her second child and the bureau received a referral because mother and child each tested positive for amphetamine and methamphetamine. The bureau closed its investigation after mother placed the newborn child for adoption and the elder child, who was then almost three years old, was placed in a legal guardianship with the child's paternal grandparents.

The bureau received another referral in July 2009 when mother gave birth to Jordan, the child at issue here, while mother was incarcerated for violating probation by being under the influence of methamphetamine. The bureau assumed custody of Jordan until mother's release and completion of family reunification services in June 2010. The dependency was vacated in February 2011.

Another dependency petition was filed a little over a year later, on June 4, 2012, shortly after mother gave birth to her fourth child. The child was born in a garage and, when transferred to a hospital, tested positive for methamphetamine. Mother also tested positive for methamphetamine and admitted to using the drug throughout her pregnancy. A petition was filed as to both the newborn and Jordan, who was then almost three years old and had been living with her maternal grandmother since August 2011.<sup>2</sup> Both children were temporarily placed with the maternal grandmother.

The jurisdictional hearing was held on June 19, 2012. Mother was provided notice but did not attend. The court sustained allegations that mother was unable to provide care for the children due to mother's "longstanding substance abuse of methamphetamine" and had made no provision for Jordan's support since August 2011. (§ 300, subds. (b), (g).) The next day, the bureau discovered the maternal grandmother had a conviction for substance abuse. The children were removed from her care and placed together in a foster home. Mother contacted the bureau in late June 2012 and, shortly thereafter, was referred to legal counsel. Mother appeared with counsel at a July 12 hearing.

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<sup>2</sup> The petition and most proceedings concerned both children. The youngest child is the subject of a separate appeal (A140975) because her biological father was provided reunification services late in the process, as discussed below.

Mother was jailed on auto theft charges but released from custody shortly before the August 23, 2012 disposition hearing. The court granted mother reunification services and twice-monthly supervised visitation. The case plan required mother to remain drug-free and to complete substance abuse, counseling and parenting programs. Jordan's presumed father, who had prior drug convictions, could not be located. The youngest child's alleged father had recently been released from jail and was undergoing paternity testing. No services were provided for him until paternity could be established.

The six-month review hearing occurred on February 7, 2013. The bureau filed a report recommending continued reunification services to mother. The bureau said mother was "working her case plan." Mother tested negative for drugs on multiple occasions from September 2012 through January 2013 and missed only two tests. She enrolled in a residential substance abuse treatment program in October 2012, where she was receiving counseling and parenting education.

The bureau reported that mother had some departures from the case plan. Mother allowed the maternal grandmother to drive her to one of mother's visits with the children, despite a court order preventing the grandmother's contact with the children. Mother was also "behaving negatively" and "rude[ly]" in recent therapy sessions and, in January 2013, asked to leave the program and join another. A social worker convinced mother to remain in the program.

At the hearing, the bureau's counsel said it was "a close case" as to whether reunification services should be extended. The children's counsel expressed "concern" as to whether there was a substantial probability that the children could be returned to mother at the end of an additional six months of services. The court also expressed concern on that point and continued the review hearing for two months to gauge mother's progress.

The bureau recommended termination of reunification services when the review hearing resumed in April 2013. Mother had dropped out of the residential rehabilitation program in March 2013, one month before completion. A program counselor said mother

“played games and did not take the program seriously.” A contested hearing was set for later in the month.

At the contested review hearing, mother testified that she had been clean and sober for 10 months, was receiving outpatient counseling, and had recently enrolled in a year-long residential program for abused women. Mother asked the court to “give me time to work on myself.” On cross-examination, mother conceded that she had previously relapsed into drug use after completing two or three separate residential drug rehabilitation programs. Mother also conceded that her current residential program was “bible-centered” and did not have drug counselors on staff.

The court terminated family reunification services to mother, finding no “substantial probability that the children could be returned to the mother and safely maintained in their home.” The trial judge questioned mother’s credibility and said she believed mother is “working on herself, but I don’t find her working on her children . . . .” The court set a permanency planning hearing for Jordan but not the youngest child. (§ 366.26.) The paternity of youngest child had recently been established and the biological father was granted reunification services. Mother did not seek writ relief from the court’s order terminating her reunification services to both children.

Jordan’s permanency planning hearing was held on August 29, 2013. The bureau filed a report recommending termination of parental rights to free Jordan for adoption and the child’s counsel supported the recommendation. The bureau reported that mother had visited Jordan regularly over the past year but did not have a strong and substantial relationship with the child. At four years old, Jordan had spent less than one year in mother’s care. The bureau reported that Jordan was adoptable and her foster mother, who had cared for her since June 2012, wished to adopt her (and her sister if the father’s reunification efforts failed).

Mother testified that she continued to engage in services to address her problems. Mother said she was living a clean and sober life, had a job, and was attending substance abuse and psychological counseling sessions. Documents attesting to mother’s employment and participation in treatment programs were submitted in evidence. Mother

was asked on cross-examination why she “didn’t do those things before your services were terminated” and she replied, “I just thought I didn’t need them. I thought I didn’t have a drug problem anymore. And now that I really realize that I do, I’m taking the . . . caution to do what I need to do to get help.” Mother asked the court not to terminate her parental rights and said she hoped to be reunited with the children.

The bureau’s counsel argued that mother failed to demonstrate either changed circumstances warranting reinstated services or sufficient progress in recovery to preclude termination of parental rights. Mother’s counsel argued that “mother has continued to make progress on what had been ordered as to her case plan, and I do believe it would be appropriate to not terminate parental rights, based upon her work . . . .”

The court found no substantial probability that the child could be returned to mother within six months. The court further found that “mother has never completed anything that was required to be completed for the reunification of this child” and did not have a substantial relationship with the child. The court terminated all parental rights and ordered the child placed for adoption. Mother filed a timely notice of appeal.

### **Discussion**

Mother claims she was denied effective assistance of counsel. All parties represented by counsel at dependency proceedings are entitled to competent counsel. (§ 317.5.) A parent claiming ineffective assistance of counsel “must demonstrate both that (1) his [or her] appointed counsel failed to act in a manner expected of reasonably competent attorneys acting as diligent advocates, and that (2) this failure made a determinative difference in the outcome, rendering the proceedings fundamentally unfair in that it is reasonably probable that but for such failure, a determination more favorable for [the parent’s] interests would have resulted.” (*In re Diana G.* (1992) 10 Cal.App.4th 1468, 1479.)

Mother claims counsel was incompetent in both the prior proceeding setting a permanency planning hearing and the planning hearing itself. Mother never filed a writ seeking review of the prior proceeding, thus forfeiting all claims relating to it. It is well-

established that “an appellate court in a dependency proceeding may not inquire into the merits of a prior final appealable order on an appeal from a later appealable order.” (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1151.) This rule applies even where the issues raised in connection with the prior order relate to the effectiveness of counsel. (*Ibid.*) “[L]ate consideration of ineffective assistance claims defeats a carefully balanced legislative scheme by allowing a back-door review of matters which must be brought for appellate review by . . . writ at the setting hearing stage or by earlier appeals . . . .” (*In re Janee J.* (1999) 74 Cal.App.4th 198, 208.) This rule of forfeiture, or waiver, applies absent “some defect that fundamentally undermined the statutory scheme so that the parent would have been kept from availing himself or herself of the protections afforded by the scheme as a whole.” (*Ibid.*) “[T]o fall outside the waiver rule, defects must go beyond mere errors that might have been held reversible had they been properly and timely reviewed.” (*Id.* at p. 209.) “[I]t is never enough, alone, to argue that counsel rendered ineffective assistance by not raising potentially reversible error on . . . writ review of a setting order.” (*Ibid.*)

Even were forfeiture not to apply, mother’s claim of ineffective assistance of counsel would fail. There is no indication in the record that counsel “failed to act in a manner expected of reasonably competent attorneys acting as diligent advocates” and, even if counsel had, it is clear that any failure did not make “a determinative difference in the outcome.” (*In re Diana G., supra*, 10 Cal.App.4th at p. 1479.) Mother failed to make substantive progress in her treatment plan warranting the extension of reunification services. When the review hearing first convened in February 2013, the bureau reported that mother was “working her case plan” but also noted that mother was “behaving negatively in the program” and, within the previous two weeks, mother said she had “learned all that she needed to learn” at the facility and wanted to leave. The court continued the hearing for two months, by which time mother had dropped out of program. A program counselor said mother “played games and did not take the program seriously.” Mother enrolled in another recovery program but the program was for abused women and did not have drug counselors on staff. The evidence supports the termination

of reunification services and provides no indication of any deficiency on the part of counsel.

The evidence also supports the termination of parental rights at the permanency planning hearing from which mother appeals. Mother does not contest the sufficiency of the evidence but claims counsel was incompetent in failing to file a petition at, or before, the planning hearing seeking reinstatement of services based on changed circumstances. (§ 388.) At the hearing, counsel tried to persuade the court to maintain parental rights by presenting evidence that mother was continuing to make efforts at rehabilitation. On appeal, mother claims counsel should have used this evidence as proof of changed circumstances warranting reinstatement of services.

The bureau argues that the attorney's failure to make a motion under section 388 is harmless because the "the trial court accepted mother's evidence and considered it as an informal [section] 388 motion." While it may be an overstatement to say that the court treated counsel's argument as "an informal [section] 388 motion" — certainly the court did not state that it was doing so — the court did receive and consider the evidence and found the facts presented on her behalf insufficient to justify deferring the termination of her parental rights. There is no reason to believe that consideration of the evidence under section 388 would have made "a determinative difference in the outcome." (*In re Diana G.*, *supra*, 10 Cal.App.4th at p. 1479.) Mother's continued efforts at rehabilitation are commendable but nonetheless are insufficient to constitute changed circumstances warranting reinstatement of services and extension of the time her young child must remain in foster care. "A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

### **Disposition**

The order is affirmed.

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Pollak, J.

We concur:

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McGuinness, P. J.

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Jenkins, J.